TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 187.

D. FREEMAN POOLE, A. JUDSON BUCKMAN, AND J. E. LEACH, APPELLANTS,

vs.

DANIEL TYLER, CLAIMANT OF THE SURPLUS AND REMNANTS OF THE SHIP EDITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1874.

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1 U. S. district court, southern district of New York.

D. FREEMAN POOLE, A. JUDSON BUCKNAM, and John Eadie Leech, petitioners and appellants,
agst.
THE SURPLUS AND REMNANTS ARISING FROM the sale of the Ship Edith, and Daniel Tyler, appellees.
} 23529.

I, George F. Betts, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this second day of April, in the year of our Lord one
2 thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-seventh.

[SEAL.] GEO. F. BETTS, *Clerk.*

BEEBE, DONOHUE & COOKE,
Proctors for Pet'rs & Appellants.
VOSE & MCDANIEL,
Pet'rs for Daniel Tyler, Appellee.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The petition of D. Freemen Poole, A. Judson Bucknam, and John E. Leech, respectfully shows:

That the petitioners compose the firm of Bucknam & Co.

That said firm, in the month of July, 1870, repaired the ship Edith in the port of New York, and on that repairing furnished materials and labor to the amount of thirty-five hundred and ninety-seven $\frac{70}{100}$ dollars, and that the amount is still justly due, with interest; that the same is a lien on said vessel, and was so at the time of its furnishing by the laws of the State of New York; that said vessel is and was a domestic vessel belonging to the port of New York.

That the said vessel has been sold by order of this court, and the proceeds are now in this court.

Wherefore the petitioners pray that the amount of their said lien be paid out of said fund, or for such relief as may be just.

J. EADIE LEECH.

Sworn to before me this 17th day of May, 1871.

JOHN A. OSBORN,
U. S. Comm'r.

3 (Endorsed:)—23529. U. S. dist. court. Bucknam & Co. vs the Ship Edith. Petition.

Let an order of reference be entered to a commissioner of this court, on notice to the assignee in bankruptcy, to take proof of the amount due the petitioners, and to report what is due them to the court, May 17th, 1871.

SAM'L BLATCHFORD.

Filed May 17th, 1871.

REC. 187—1

Testimony on reference.

U. S. district court, southern district of New York.

IN THE MATTER OF THE PETITION OF BUCKnam & Co. for repairs done to and supplies furnished the Ship Edith, &c.

Beebe, Donohue & Cooke, proctors for petitioners.

MAY 17, 1871.—Pursuant to order and notice of reference—present, proctors for petitioners, and John Sedgwick, esq., as assignee of Charles Caron, bankrupt, and Vose & McDaniel for mortgagee, Daniel Tyler.

Evidence for petitioners.

JOHN E. LEECH, being called by petitioners, and sworn, says:

My business is shipwright. I am one of the firm of Bucknam
4 & Co., composed of D. Freeman Poole, A. Judson Bucknam, and myself. Our firm did repairs on the Edith in July, 1870. The vessel belongs in New York. The amount of repairs was $3,579.70; this was for labor and materials; no part of this has been paid.

Ex. by Mr. Sedgwick:

She cleared on the 22d July, and sailed a day or two afterwards.

Redirect:

The lien was filed on the 27th of July, 1870.

Ex. by Mr. Vose:

We caused an attachment to be issued out of the supreme court for this claim under the State law, and the Edith was seized by the sheriff of the city and county of New York, and a satisfactory bond was given under the New York State law; the vessel thereupon was discharged from the custody of the sheriff and from the attachment. A suit was brought on the bond in New York supreme court, and is now at issue and undetermined.

JOHN E. LEECH.

Subscribed and sworn to before me this 17th day of May, 1871.
JOHN A. OSBORN,
U. S. Commissioner.

JOHN E. LEECH, called by petitioners and sworn, says:

My business is shipwright; am one of the firm of Bucknam & Co., composed of D. Freemen Poole, A. Judson Bucknam, and myself. Our firm did repairs on the Edith in July, 1870. The vessel then belonged to New York, to Chas. Caron. Bairnson was master of her. We also furnished materials for repairs. The repairs were done by order of
the captain and the owners. The amount of repairs was $3,597.37,
5 including the labor and repairs. The vessel was on the water the whole time; the repairs and materials were put on. The vessel has always been engaged in foreign trade.

Cross examined by Mr. Sedgwick:

The vessel cleared this port on the 22d of July, and sailed a day or two afterwards.

Redirect:

A lien was duly filed for repairs and materials on the 27th of July, 1870. No part of the bill has been paid.

Cross-examined by Mr. Vose:

We caused an attachment to be issued out of the supreme court of the State of New York for this claim under the State law, and the Edith was seized by the sheriff of the city and county of New York. A satisfactory bond was given under the New York State law, and the vessel thereupon discharged from the custody of the sheriff, and from the attachment.

A suit was brought on the bond in the New York supreme court, which is now at issue and undetermined.

JOHN E. LEECH.

Subscribed and sworn to before me this 1st day of Dec., 1871.

JOHN A. OSBORN,
U. S. Commissioner.

(Endorsed:) 23529, U. S. dist. court, southern district of New York. A. Judson Bucknam and others agst. The surplus and remnants of the ship Edith. Testimony on reference.

6 U. S. district court.

JOHN SEDGWICK AS ASSIGNEE, &C., AND DANIEL TYLER as mortgagee, and D. Freeman Poole and others, composing the firm of Bucknam & Co.,
against
THE SURPLUS AND REMNANTS OF THE SHIP Edith, &c.

I, John A. Osborn, the United States commissioner to w referred by two orders duly entered in the above-entitled one on the 17th day of May, A. D. 1871, and the other on the June, A. D. 1871, to ascertain and report who is entitled to the surplus and remnants of the ship Edith, do hereby report to the court:

That the ship Edith was sold on the 8th day of May, A. D. 1871, under process issued on a decree of this court in the case of the New York Harbor and Towboat Company against the ship Edith, and realized on such sale the sum of.... $33,600 00

That out of this sum there has been paid, pursuant to several orders heretofore made by this court the following sums, to wit:

To the New York Harbor Towboat Company the sum of	$143 77	
James H. Yeaton, John James and J. G. Bairnson	655 66	
Marshal's costs	948 54	
Clerk's costs	377 25	
G. F. Betts, commissioner's costs	100 00	
7 John Sedgwick, assignee for repairs to said ship	147 96	
		2,573 18

Testimony on reference.

U. S. district court, southern district of New York.

IN THE MATTER OF THE PETITION OF BUCKnam & Co. for repairs done to and supplies furnished the Ship Edith, &c.

Beebe, Donohue & Cooke, proctors for petitioners.

MAY 17, 1871.—Pursuant to order and notice of reference—present, proctors for petitioners, and John Sedgwick, esq., as assignee of Charles Caron, bankrupt, and Vose & McDaniel for mortgagee, Daniel Tyler.

Evidence for petitioners.

JOHN E. LEECH, being called by petitioners, and sworn, says:

My business is shipwright. I am one of the firm of Bucknam
4 & Co., composed of D. Freeman Poole, A. Judson Bucknam, and myself. Our firm did repairs on the Edith in July, 1870. The vessel belongs in New York. The amount of repairs was $3,579.70; this was for labor and materials; no part of this has been paid.

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She cleared on the 22d July, and sailed a day or two afterwards.

Redirect:

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JOHN E. LEECH.

Subscribed and sworn to before me this 17th day of May, 1871.
JOHN A. OSBORN,
U. S. Commissioner.

JOHN E. LEECH, called by petitioners and sworn, says:

My business is shipwright; am one of the firm of Bucknam & Co., composed of D. Freemen Poole, A. Judson Bucknam, and myself. Our firm did repairs on the Edith in July, 1870. The vessel then belonged to New York, to Chas. Caron. Bairnson was master of her. We also furnished materials for repairs. The repairs were done by order of
the captain and the owners. The amount of repairs was $3,597.37,
5 including the labor and repairs. The vessel was on the water the whole time; the repairs and materials were put on. The vessel has always been engaged in foreign trade.

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A suit was brought on the bond in the New York supreme court, which is now at issue and undetermined.

JOHN E. LEECH.

Subscribed and sworn to before me this 1st day of Dec., 1871.

JOHN A. OSBORN,
U. S. Commissioner.

(Endorsed:) 23529, U. S. dist. court, southern district of New York. A. Judson Bucknam and others agst. The surplus and remnants of the ship Edith. Testimony on reference.

6 U. S. district court.

JOHN SEDGWICK AS ASSIGNEE, &C., AND DANIEL TYLER as mortgagee, and D. Freeman Poole and others, composing the firm of Bucknam & Co.,
against
THE SURPLUS AND REMNANTS OF THE SHIP Edith, &c.

I, John A. Osborn, the United States commissioner to whom it was referred by two orders duly entered in the above-entitled matters, the one on the 17th day of May, A. D. 1871, and the other on the 10th day of June, A. D. 1871, to ascertain and report who is entitled to the surplus and remnants of the ship Edith, do hereby report to the court:

That the ship Edith was sold on the 8th day of May, A. D. 1871, under process issued on a decree of this court in the case of the New York Harbor and Towboat Company against the ship Edith, and realized on such sale the sum of.... $33,600 00

That out of this sum there has been paid, pursuant to several orders heretofore made by this court the following sums, to wit:

To the New York Harbor Towboat Company the sum of	$143 77	
James H. Yeaton, John James and J. G. Bairnson	655 66	
Marshal's costs	948 54	
Clerk's costs	377 25	
G. F. Betts, commissioner's costs	100 00	
7 John Sedgwick, assignee for repairs to said ship	147 96	
		2,573 18

Beside the sums hereinafter mentioned, leaving a balance of	$31,226 82
From this should be deducted for commissioner's fees and disbursements on this reference	50 00
Leaving for distribution to Messrs. Bowring & Company, and Daniel Tyler, respectively holding mortgages, the one on one-half and the other on three-quarters of said ship, and to John Sedgwick, esquire, as assignee in bankruptcy of Charles Caron, the former owner of said ship, a balance of	$31,176 82

That the said mortgage to Bowring & Company was prior in date and in record to the said mortgage to Daniel Tyler.

That the said surplus should be divided into two equal parts; that out of one-half thereof said ship should be paid the amount due upon the said mortgage to Messrs. Bowring & Company, to wit, the sum of $5,976.24, and that the balance of said one-half should be equally divided between said Daniel Tyler and the said John Sedgwick.

That the other half of said balance should be paid to the said Daniel Tyler, and that the amounts so paid to him should be credited upon the note secured by said mortgage held by him as aforesaid.

That the said C. P. Bowring & Company have been paid out of said surplus and remnants, by an order heretofore made and entered herein, the sum of $5,776.24.

8 That the said Daniel Tyler has been paid out of said surplus and remnants the sum of $16,326.24, and the said John Sedgwick the sums of $3,700.00, pursuant to an order made and entered herein May 16, 1871, and that it was agreed and stipulated between said assignee and said Tyler that their respective rights upon this hearing, and any proceedings taken to review this report, should not be affected in any way by such payments, or the order pursuant to which the same was made, except that each should be charged with the sum so paid to him.

That the account between said parties in reference to the balance hereinbefore mentioned, is as follows:

Balance		$31,176 82
One-half of this is		15,588 41
Out of this has been paid to C. P. Bowring & Co		5,776 24
Leaving a balance of		9,812 17
One-half of this is		4,906 09
And is to be paid to John Sedgwick, assignee, as aforesaid.		
The other half of this is		4,906 08
And is to be paid to Daniel Tyler, as aforesaid, together with the remaining half of said surplus and remnant		15,588 41
Making in all		$20,494 49
Out of this has been paid—		
To Daniel Tyler	$16,326 24	
And John Sedgwick, by order of May 16, as commissions and counsel fee	550 00	
		16,876 24
Leaving a balance of		3,618 25

To be paid to said Daniel Tyler.

9 There remains to be paid to John Sedgwick, after charging him with the payment of $3,700.00, as aforesaid, the sum of..... $1,206 09

And I do further report that the said Bucknam & Company presented a claim to be paid out of said surplus and remnants, the sum of $3,470.70, with interest and costs, and that they have presented evidence before me in support of said claim, which evidence, together with that presented before me by the said Daniel Tyler and John Sedgwick, accompanies this report; but I am of the opinion, and do report, that the said Bucknam & Company have no lien upon said surplus and remnants, nor legal right to be paid any portion of said claim out of the same on this proceeding.

And I do further report that the claims above set forth are the only libels, petitions, liens or claims that have been presented in this court against the ship Edith or her proceeds; or against the surplus and remnants of such proceeds.

And that Daniel Tyler and John Sedgwick, as assignee of Charles Caron, are entitled to the sums above set forth respectively.

All of which is respectfully submitted.

Dated October 24th, 1871.

JOHN A. OSBORN,
U. S. Commissioner, Southern Dist. of New York.

(Endorsed:) 23529; 514. U. S. district court. In the matter of the surplus and remnants of the ship Edith. Report of John A. Osborn, U. S. commissioner. Filed October 25th, 1871. Ent'd order.

10 U. S. district court.

IN THE MATTER OF THE PETITION OF BUCKnam & als.,
vs.
THE PROCEEDS OF THE SHIP EDITH, &c., &c.

Exceptions to the report of the commissioner in the above matter.

First. The commissioner should have reported that the petitioners are entitled to be paid out of the proceeds of the vessel in court.

Second. That the commissioner should have reported that the petitioner had a lien on the fund in court for the amount of their repairs.

Third. That the report is erroneous in combining a report on the independent petition and proceedings of Bucknam & Co. with the claims of Mr. John Sedgwick, the assignee.

Fourth. That a separate and independent report should have been made in the case of Bucknam & Co.

Fifth. That the said Bucknam & Co. should be paid out of the fund in court.

BEEBE, DONOHUE & COOKE,
For Bucknam & Co.

(Endorsed:) Bucknam et als. vs. Proceeds of Edith. Exceptions. Beebe, Donohue & Cooke, proctors. Filed Nov. 15, 1871.

11 U. S. district court, southern district of New York.

JOHN SEDGWICK, AS ASSIGNEE OF CHARLES Caron, and Daniel Tyler, as mortgagee, &c., and D. Freeman Poole and others composing the firm of Bucknam & Co.,
agst.
THE SURPLUS AND REMNANTS OF THE SHIP Edith.

Daniel Tyler, by Vose & McDaniel, his attorneys, excepts to the report of John A. Osborn, esq., U. S. commissioner in the above-entitled matter, filed October 25th, 1871.

First. For that the said commissioner found and reported that the surplus in his report mentioned should be divided into two equal parts; that out of the one-half thereof should be paid the amount due upon the mortgage in said report mentioned to Messrs. Bowring & Company.

Second. For that the said commissioner found and reported that the balance of said one-half should be equally divided between said Daniel Tyler and John Sedgwick.

Third. For that the said commissioner found and reported that there should be paid to the said John Sedgwick, out of said surplus and remnants, the sum of twelve hundred and six dollars and nine cents.

Fourth. For that the said commissioner failed and refused to find and report that said surplus and remnants, after paying the prior liens therein mentioned in his said report, should be divided into four
12 equal parts; that the mortgage to said Bowring & Company should be charged as paid out of one of said fourth parts, and that said Daniel Tyler should be declared entitled to three of said fourth parts.

Fifth. For that said commissioner failed and refused to find and report in accordance with the principle stated in the fourth exception, to wit, that the whole balance of said surplus and remnants remain in the registry of this court, (after paying the said commissioner's fees on this hearing,) to wit, the sum of four thousand eight hundred and twenty-four dollars and thirty-four cents be paid to said Daniel Tyler, and that said John Sedgwick, as assignee, and pay to him out of the portion of such surplus and remnants heretofore paid to him as stated in such report the sum of sixteen hundred and eighty-two dollars and four cents, so as to make the whole amount received by said Daniel Tyler out of said surplus and remnants equal to three-fourths thereof, after deducting the prior liens on the whole of said ship mentioned in said report.

Wherefore, the said Daniel Tyler prays that said exceptions may be sustained, and an order made by this court such as the said commissioner should have made, and such as is stated in the fifth of said exceptions.

New York, October 31, 1871.

VOSE & McDANIEL,
Proctors for Daniel Tyler.

(Endorsed:) 23529; 514. U. S. district court. John Sedgwick, as assignee of Charles Caron and Daniel Tyler, as mortgagee, etc., and D. Freeman Poole, etc., agst. The surplus and remnants of the ship Edith. Exceptions of Daniel Tyler.

VOSE & McDANIEL,
Proctors for D. Tyler.

Filed November 1st, 1871.

13 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms, in the city of New York, on Friday, the 12th day of January, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Samuel Blatchford, district judge.

JOHN SEDGWICK, ASSIGNEE IN BANKRUPTCY OF Charles Caron, Daniel Tyler, as mortgagee, and D. Freeman Poole, A. Judson Bucknam and John E. Leech, petitioners,
vs.
THE SURPLUS AND REMNANTS OF THE SHIP EDITH. } 23529; 514.

This case having been heard on exceptions to the report of John A. Osborn, United States commissioner, and on the petitions of the claimants and the proofs taken before such commissioner, and having been argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged and decreed by the court that the exceptions filed by John Sedgwick, as assignee in bankruptcy of Charles Caron, and by D. Freeman Poole, A. Judson Bucknam and John E. Leech, composing the firm of Bucknam & Company, be, and they hereby are, overruled, and that the exceptions filed by Daniel Tyler be, and they hereby are, sustained, and the report aforesaid as to said claim of Bucknam and Company is hereby sustained.

14 It is further ordered, adjudged and decreed that the surplus and remnants of the ship Edith, after paying the prior liens thereon mentioned in the report of said commissioner, should be divided into four equal parts; that three of said parts, to wit, the sum of twenty-three thousand three hundred and eighty-two $\frac{62}{100}$ dollars ($23,382.62) should be paid to Daniel Tyler, to be credited by him on the mortgage mentioned in said report; that the mortgage to Bowring & Company mentioned in said report should be paid out of the other of said parts, which said part amounts to seven thousand seven hundred and ninety-four $\frac{20}{100}$ dollars; that the amount due on said mortgage to Bowring & Company is five thousand and seven hundred and seventy-six $\frac{24}{100}$ dollars ($5,776.24,) and that the residue of said one-fourth part, to wit, the sum of two thousand and seventeen $\frac{96}{100}$ dollars ($2,017.96,) be paid to John Sedgwick, as assignee in bankruptcy of Charles Caron.

And a partial distribution of said surplus having heretofore been made by consent of the respective parties, subject to the further order of this court, it is further ordered that out of the sum heretofore paid to said John Sedgwick, as such assignee, out of such surplus, he restore and pay to the said Daniel Tyler, or his attorney, the sum of sixteen hundred and eighty-two dollars and four cents ($1,682.04,) and that the entire surplus now in the registry of this court, to wit, the sum of four thousand eight hundred and twenty-four $\frac{34}{100}$ dollars ($4,824.34,) be also paid to said Tyler or his attorneys, (less the costs of the officers of court in this matter,) unless within ten days from the entry of this decree the claimants aforesaid appeal to the circuit court of the United States for the southern district of New York.

SAMUEL BLATCHFORD.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles J. Jacobs, being duly sworn, says, that on the 11th day of January, 1872, at 68 Wall street, in this city, he served upon Messrs

15 Beebe, Donohue and Cooke, proctors for Messrs. Bucknam & Co., a copy of the within decree, with notice of settlement for 12th inst., at 11 a. m., by delivering the same to, and leaving it with Mr. Hall, a person in, and having charge of, the office of said proctors during their absence therefrom.

CHARLES J. JACOBS.

Sworn to this 12th day of January, 1872, before me.

MICHAEL PHILLIPS,
Notary Public, N. Y. City and County.

U. S. district court.

IN THE MATTER OF THE PETITION OF A. JUDSON Bucknam and others
vs.
THE SURPLUS AND REMNANTS OF THE SHIP EDITH, her tackle, &c.

GENTLEMEN: Please to take notice that the petitioners in above-entitled matter hereby appeal from the decree in the above-entitled matter, and so much thereof as decrees against the claim of petitioners, to the next circuit court of the United States for the southern district of New York, in the second circuit. Dated January 18th, 1872.

Yours, &c.,

BEEBE, DONOHUE & COOKE,
Proctors for Petitioners, Bucknam & Co.

16 To GEORGE F. BETTS, Esq., *Clerk.*
VOSE & MCDANIEL, Esqs.,
Proctors for Tyler.
JOHN SEDGWICK, Esq.,
Assignee in Bankruptcy of Charles Caron.

(Endorsed:) 23529; 514. U. S. district court. In the matter of the petition of A. Judson Bucknam and others vs. The remnants of ship Edith, her tackle, &c. Notice of appeal.

BEEBE, DONOHUE & COOKE,
Proctors for Petitioners.

To GEO. F. BETTS, Esq., *Clerk.*

Filed January 18th, 1872.

17 At a term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the seventh day of February, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Lewis B. Woodruff, circuit judge.

D. FREEMAN POOLE, A. JUDSON BUCKNAM, AND John E. Leech, appellants,
versus
THE SURPLUS AND REMNANTS OF THE SHIP Edith, and Daniel Tyler.

On reading and filing the notice of motion herein, dated January 23,

1872, and the annexed affidavit of E. P. Wheeler, sworn to January 21, 1872, and after hearing Mr. E. P. Wheeler for the motion, and Mr. C. Donohue opposed, it is ordered that, upon the said Daniel Tyler filing the annexed stipulation in the office of the clerk of the district court of the United States for the southern district of New York, in lieu of the money now in said registry forming part of the surplus and remnants of the ship Edith, that the said money be paid to the said Daniel Tyler, or to his attorneys, pursuant to the decree heretofore entered in said district court, notwithstanding the appeal taken therefrom to the circuit court of the United States for said southern district.

A copy.

KENNETH G. WHITE, *Clerk.*

18 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Saturday, the tenth day of February, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Samuel Blatchford, district judge.

D. FREEMAN POOLE, A. JUDSON BUCKNAM, AND John E. Leech, appellants,
agst.
THE SURPLUS AND REMNANTS OF THE SHIP Edith, and Daniel Tyler, appellees. } 23,529.

Upon the final decree for the distribution of the surplus and remnants of the ship Edith, heretofore made in this court, and upon filing a certified copy of an order made by the circuit court of the United States for the southern district of New York in the above appeal, dated February 7, A. D. 1872, and the stipulation therein mentioned, and after hearing Mr. E. P. Wheeler for the appellee, Daniel Tyler, and filing proof of service of due notice of application for this order on Beebe, Donohue & Cooke, proctors for D. Freeman Poole and others, appellants, and said proctors not appearing, it is ordered that the money now in the registry of this court, directed by said final decree to be paid to said Daniel Tyler, or his attorneys, be paid accordingly, notwithstanding the appeal taken by the appellants aboved named, and that the stipulation aforesaid remain in lieu thereof.

(Signed) SAML. BLATCHFORD.

19 Take notice that we will apply to the United States district court for the southern district of New York, at a term thereof to be held at the U. S. court buildings, in the city of New York, on the tenth day of February, A. D. 1872, at 11 a. m., for the entry of the foregoing order.

New York, February 7, 1872.

VOSE & McDANIEL,
Proctors for Daniel Tyler, Appellee.

To Messrs. BEEBE, DONOHUE & COOKE,
Proctors for Appellants.

C. W. BANGS, Esq.,
Sol. for Assignee, John Sedgwick.

To the honorable the circuit court of the United States for the southern district of New York.

The petition of appeal of D. Freeman Poole, A. Judson Bucknam, and John E. Leech, respectfully shows:

That these appellants heretofore filed their petition in the district

court of the United States for the southern district of New York, setting forth that the ship Edith had been sold and the proceeds of her sale paid into the registry of the court, and that the petitioners had a lien on such proceeds for a claim of theirs for materials furnished and repairs made on the vessel; that the assignee in bankruptcy, Hon. John Sedgwick, appeared and claimed the fund, denying the petitioners' right; that Daniel Tyler appeared and claimed the amount under a mortgage on the ship; that evidence was taken, and such proceedings were had that, by the order and decree of the said court, it was adjudged that the petitioners had no lien, and their petition was dismissed.

That your petitioners allege and charge that the said order and decree is erroneous, and ought to be reversed.

20 Wherefore the petitioners pray that the said cause should be reheard, and the order and decree therein reversed, and the appellants be paid their lien.

BEEBE, DONOHUE & COOKE,
For Petrs., Appellants.

(Endorsed:) 23,529. U. S. circuit court, S. D. of N. Y. D. Freeman Poole et als., petrs, appellants, vs. The proceeds of the Edith. Daniel Tyler, appellee. Petition of appeal. Filed April 1, 1873.

Know all men by these presents that we, D. Freeman Poole, A. Judson Bucknam, and John E. Leech, and Charles Donohue, are held and firmly bound unto Daniel Tyler in the sum of two hundred and fifty dollars, to be paid to the said Daniel Tyler, his executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the first day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the said D. Freeman Poole, A. Judson Bucknam, and John E. Leech, as appellants, have appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the twelfth day of January, 1872, in a matter in which said Poole, Bucknam, and Leech are petitioners against the surplus and remnants in the registry of the U. S. district court arising from the sale of the ship Edith:

Now, therefore, the condition of this obligation is such, that if the above-named appellants, D. Freeman Poole, A. Judson Bucknam, and John E. Leech, shall prosecute said appeal with effect, and pay all costs which shall be awarded against them as such appellants therein,

21 if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

JOHN E. LEECH. [L. S.]
C. DONOHUE. [L. S.]

Sealed and delivered and taken and acknowledged this first day of April, 1873, before me.

JOHN A. OSBORN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles Donohue, being duly sworn, doth depose and say that he

resides in the southern district of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

C. DONOHUE.

Sworn to this first day of April, A. D. 1873, before me.

JOHN A. OSBORN,
U. S. Commissioner.

This bond approved as to form and amount and sufficiency of surety. Dated New York, 18 .

22 U. S. circuit court, southern district N. Y.

D. FREEMAN POOLE, A. JUDSON BUCKNAM, AND John Eddie Leech, petitioners & appellants,
agst.
THE SURPLUS & REMNANTS ARISING FROM THE sale of the Ship Edith, and Daniel Tyler, appellees.

It is admitted that on the 11th of January, 1870, Charles Carow, being the owner of the vessel, made and delivered to Daniel Tyler, to secure an existing indebtedness from Carow to Tyler, a mortgage upon three-fourths of the said vessel. On such mortgage there was due the sum of $55,424.46, with interest from the 1st of July, 1870. This mortgage was recorded in the New York custom-house on the 11th of January, 1870, and a copy of it was afterwards duly filed in the office of the register of the city and county of New York. The mortgage
23 contains a clause whereby the mortgagor "doth promise, covenant, and agree, for his heirs, executors, and administrators," to and with the mortgagee, "his heirs, executors, administrators, and assigns, to warrant and defend the said three-fourths part of said ship Edith and all the other before-mentioned appurtenances, against all and every person and persons whomsoever," and a clause that a sale under the mortgage "shall forever be a perpetual bar, both in law and equity, against the mortgagor, his executors, administrators, and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under them, or either of them."

Dated New York, April 2nd, 1873.

(Signed) BEEBE & WILCOX,
For Appellants.

Filed Oct. 15th, 1874.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Lewis B. Woodruff, circuit judge.

A. J. BUCKMAN ET AL., PETITIONERS & APPELLANTS,
vs.
SURPLUS OF THE SHIP EDITH, &C., APPELLEE.

The above cause coming on for hearing on appeal,

Mr. Charles Donohue is heard in behalf of the petitioners & appellants.
Mr. Everett P. Wheeler is heard in behalf of the appellee.
Mr. Charles Donohue is heard in reply.
C. A. V.

25 Circuit court of the United States for the southern district of New York, in admiralty.

D. FREEMAN POOLE ET AL., PETITIONERS & APpellants,
vs.
THE SURPLUS OF THE PROCEEDS OF THE SHIP Edith, Daniel Tyler, mortgagee & claimant, and John Sedgwick, assignee, &c.

WOODRUFF, *Circuit J.:*

The ship Edith was heretofore sold under and by virtue of a decree of the district court in admiralty, and after satisfying from the proceeds certain claims of the libellants and their costs, &c., there remained in the registry of the court the sum of $31,176.82, subject to distribution among claimants. The above-named Poole and others thereupon presented their petition, alleging that they, as shipwrights, had made repairs upon the said ship and furnished materials; and claiming that they had a lien upon the ship therefor, they ask that their said claim be paid out of such proceeds. Their petition and claim was resisted by the above-named Daniel Tyler, a mortgagee of three-fourth
26 parts of the ship, to whom was due a sum which, after the payment of another mortgage on one-half the vessel, exceeded the residue of such surplus proceeds; and by John Sedgwick, the assignee in bankruptcy of Charles Caron, the owner of the ship.

There was some controversy between Tyler and the said assignee as to their relative rights, but the decision of the *of the* court thereupon is not appealed from by either of them, and need not be further noticed.

The court held and decided that the petitioners, Poole and others, had no lien upon the ship, nor, as between them and the mortgagee and the assignee in bankruptcy, any title to such surplus.

And it was therefore decreed that such surplus, after paying such mortgage on one-half, be divided between the said mortgagee, Tyler, and such assignee, in proportions deemed to be according to their respective rights as between themselves.

The petitioners, Poole and others, being thus excluded from any share in the said surplus, have appealed to this court.

The ship Edith was a domestic vessel. Her owner resided in the city of New York. The repairs in question were done by the petition-
27 ers, and the materials therefor were furnished to the ship while lying in navigable waters in the port of New York, by order of her master and her owner, in the month of July, 1870. The petitioners in their petition set up no other ground of claim; but in the proofs that were taken it appeared that the petitioners, after the repairs were made, attempted to claim and enforce a lien therefor under a statute of the State of New York, in pursuance of which they caused an attachment to be issued to the sheriff of the city and county of New York, who by virtue thereof seized the ship. Whereupon a "satisfactory" bond was given by or on behalf of her owner, as permitted by that statute, and the ship was discharged from custody and from the said attachment. An action was then brought upon the said bond, which is now pending and undetermined in the State court.

I. Independent of the technical objection that the petitioners did not come to the court alleging in their petition any lien upon the ship, acquired under the statute of the State of New York, their proceedings to enforce a lien under the State law will not avail anything in this case against the claim of the mortgagee.

28 1st. The cases in re Josephine (39 N. Y. Rep., 19) and Brookman v. Hamill, (43 id., 554,) under the authority of The Moses Taylor (4 Wallace, 568) and The Hine v. Trevor, (id. 555,) must be regarded as settling, for the present, at least, that the statute of New York in question, (acts of legislature of N. Y. in 1862, chap. 482, p. 956,) so far as it attempts to give a remedy for the enforcement of maritime contracts which is not according to the course of the common law, is unconstitutional and void, and that the remedy given by that statute is not a common-law remedy.

2d. It is claimed that those decisions should be confined to the mere proposition that the manner of enforcing the lien therein attempted to be given is unconstitutional and void, but that the lien given by the statute is nevertheless a valid lien. Neither the language of the cases nor other reasons warrant any such distinction. The grounds of those decisions forbid it. The lien which is to be created under the New York statute and the manner of enforcing it cannot be thus separated. The statute was an attempt, so far as maritime contracts were embraced therein, to take jurisdiction from the courts of admiralty, and

29 prescribe a new incident to such contracts, and enforce the right conferred by proceeding strictly in rem.

If, by the rules and principles of maritime law as administered in courts of admiralty, and governing its jurisdiction and the exercise thereof, a lien already existed in virtue of the contract, then, separate and distinct from the provisions of the statute for enforcing it, which are thus conceded to be void, the supposed lien obtains no force or validity from the statute. In that respect the statute is an idle and useless declaration. If, by the rules and principles governing courts of admiralty, no such lien exists, then the attempt to control the court of admiralty, and so interfere with their administration by attempting to create new maritime liens not known or recognized in those courts, and which affect the rights of parties there who rely upon the law-maritime in their dealings, may be deemed liable to all the objections which induced the decisions to which I have referred. If the lien exists as the creature of the State law, how is it to be executed? Strike out the mode of proceeding for its enforcement prescribed by the statute, and there is no common-law mode provided by which the State courts can

30 give it any efficacy, and the moment it is sought to enforce it as a lien in the court of admiralty it proceeds upon the idea that the States can give to those courts jurisdiction not known or pertaining to them under the Constitution and laws of the United States, or at least can introduce into those courts new rules of decision and establish priorities not known to the maritime law—priorities which, as against persons who may have other and recognized maritime liens, would be in direct conflict with the maritime law.

In its bearing upon this point the dissenting opinion of Chief-Justice Taney, in Taylor v. Carryl, (20 How., 600,) concurred in by Justices Wayne, Grier, and Clifford, is very significant. Though not deemed by the majority of the court to meet the grounds on which their opinion was placed in that particular case, it is an able and convincing maintenance of the courts of admiralty and the admiralty law against any modification of their authority or rules of decisions by the States.

The consideration of this case will, therefore, raise the question whether the petitioners had a lien upon the ship by the maritime
31 law; and the conclusion on that subject is that they had not, as will be herein more fully stated. But it is equally clear that the contract for repairs and materials is a maritime contract, of which courts of admiralty have jurisdiction. The question whether the States can by statute annex to a maritime contract any lien on the vessel not known to the maritime law, and whether the court of admiralty ought to recognize and enforce it, has been very much discussed, as will hereafter be seen. The language used by Mr. Justice Clifford in The Belfast, (7 Wallace, at p. 645,) and repeated in Leon v. Galceron, (11 Wall., 185, 192,) imports that although the contract be maritime, yet if there be no lien incident thereto by the maritime law, the States may by statute give a lien, if their legislation do not amount to a regulation of commerce, and they may provide for enforcing such lien.

The case last named may be deemed to illustrate this. There the claim was for wages of mariners. It was founded on not only a maritime contract, but, by the law maritime, a contract out of which arose a lien on the vessel. The Supreme Court nevertheless sustained a suit in personam in the State court, under the laws of Louisiana, in
32 which writs called "writs of sequestration" were issued and levied on the vessel as a security to respond to the judgment which the plaintiff might recover against the owner of the vessel as defendant in the suit. The court say that the mariners had a right to proceed in personam in the State court against the owner, and that such a writ, when duly issued and served in such a case, has substantially the same effect in the practice of the courts of that State as an attachment on mesne process in jurisdiction, where a creditor is authorized to employ such a process to create a lien upon the property of his debtor as a security to respond to his judgment. And the right to obtain a lien by foreign attachment under the State law, not as a maritime proceeding in rem, but as a means of obtaining security for the debt and enforcing its payment, seems to lie at the foundation of the opinion of the majority of the court in Taylor v. Carryl, (20 How., 583) above adverted to. This furnishes no warrant for sustaining the lien alleged to have been given by the law of the State of New York, the only mode of enforcing which, and the only right given by the statute to enforce it at all, are a proceeding strictly in rem, and not in personam; and
33 that is void under the decisions in the cases of The Moses Taylor and The Hine v. Trevor, above cited. (See on this point the cases in re Josephine, 39 N. Y. Rep., 19, and Brookman v. Hamill, 43 N. Y., 555.) That in a suit in personam, property of the debtor may be attached under State laws, and held to satisfy the judgment which may be recovered, whether the property be a ship or property in any other form may not be doubtful, (Taylor v. Carryl, 20 How., 583; Leon v. Galceron, 11 Wallace, 185,) and that courts of admiralty, where the rules regulating process allow it, may authorize process in rem for the same purpose, will be suggested in considering the meaning and effect of the recent rule of the Supreme Court hereinafter mentioned.

But it may well be doubted that the Supreme Court or Mr. Justice Clifford meant to be understood to hold that a State may annex to a martime contract, or even to any contract relating to a ship, a lien which shall operate to withdraw her in any degree from the operation and effect of the law maritime, by which courts of admiralty are governed, and which by the Constitution they are authorized and are bound to administer, or which shall hinder or prevent courts of admiralty from

dealing with the ship in all respects according to the principles
34 of the admiralty law. Can the States by their statutes create liens which shall interfere with or disturb the priorities given by the law maritime? If they can, then power to maintain and administer the jurisdiction and laws of the admiralty has not been conferred upon the Government of the United States and its courts. For illustration, suppose a case of collision, and a suit against the ship to recover therefor in the admiralty. Can the States create liens upon which any party may intervene, by cross-libel or otherwise, and assert a priority over the maritime lien, and take, as the case may be, the whole value of the vessel?

Such State liens may perhaps be good as against the owner, who was bound by the contract; and liens may arise in suits in personam by attachment or like process, but they must be held subject to the maritime law, and seizures on such attachments may operate on the vessel, in the condition in which she is found, and hold her subject to all prior liens as security for the judgment which may be recovered.

3rd. But, independent of the suggestions already made, the statute itself under which the petitioners attempted to obtain a lien is
35 fatal to any maintenance of that lien as the creation of that statute. The attachment which the statute authorized having been issued, and the vessel seized, a "satisfactory bond" was given under the State law. The vessel thereupon was discharged from the custody of the sheriff and from the attachment. This is the language of the proof. The bond here referred to and prescribed by the statute is conditioned for the payment of any and all claims and demands which shall be established to be due to the person or persons in whose behalf such warrant was issued, and to have been a subsisting lien upon such vessel, pursuant to the provisions of this act, &c., &c.

And the 12th section declares that, upon the giving of such bonds, the officer issuing the attachment shall discharge the same, and thereafter "no further proceedings against the said vessel so seized shall be had under the provisions of this title founded upon any demand secured by such bond."

And by sections 28 and 29, it is provided that where the creditor has taken the preliminary steps to acquire a lien, the owner need not wait until the vessel has been seized. He may apply to the officer and
36 give such bond, and the officer shall direct that the said lien be marked by the clerk as discharged, and the same shall cease to be a lien upon such vessel."

The statute itself, therefore, makes the giving of bond for the payment of the claim terminate the lien. The bond becomes the substitute for the vessel. This, in my opinion, ends the question of lien under or by virtue of the State law. The petitioners setting up and claiming under this statute must accept its provisions with all their necessary consequences; and when the owners of the Edith gave the statute bond for the discharge of the ship, there was an end to their lien under the State law. It does not affect this result that the bond would be held void as part of the remedy under the decisions above cited. The only lien the petitioners obtained by virtue of the statute was subject to be defeated by the giving of the bond, and it was thereby defeated.

The most that can be said of the decisions declaring the bond void is that the whole statute, viz, the attempted creation of the lien, the attachment for its enforcement, the giving of the bond, and the remedy thereon, are all so connected under the statute, that they all fall
37 together under the one condemnation.

4th. This result is still more apparent when the limitations inserted in the New York statute are adverted to. They make it plain that it was not the intent of that statute to create a lien upon the vessel independent of the prescribed mode of its enforcement. The statute did not declare a lien to be a contai*n*ing lien, and to be availed of in any mode known to the common law. The precise steps to make the declared lien available and the only mode of making it effective are pointed out; and it is expressly declared that the debt shall cease to be a lien at the expiration of six months after the debt was contracted, unless at that time the ship or vessel shall be absent from the port at which such debt was contracted; in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall return to said port. The proceeding is in all respects summary. Within the period thus limited a warrant must be issued for the seizure of the vessel; advertisements must be made for other claims; after thirty days, if the owner do not obtain a discharge of the vessel by giving bonds, the vessel must be sold, and the proceeds distributed among those who have pre-
38 sented claims. This shows the nature of the right called a lien; it is inextricably connected with the means provided for its enforcement, and they being void, it has no longer anything of value or force.

And it is especially clear that after the lapse of six months, or of the further term of ten days, what is called the lien ceases. As a lien it has operated to hold the vessel for that period, subject to be taken under the warrant. Then it has performed its whole office, and by the very words of the statute it ceases. After that the vessel, if it be held at all, is held by virtue not of a continuing lien, but by virtue of process and seizure, whereby it becomes a security for the payment of claims which may be presented.

The process and seizure and authority to sell being adjudged void, nothing remains to the creditor either of lien or security. No one would, I think, claim that where no warrant was issued for the seizure and sale of the vessel, the lien continued beyond the period expressly limited. If not, then a void proceeding provided for by statute is no better than taking no proceeding, and the lien of the creditor is equally at
39 an end. He stands a general creditor of the owner, that is all. In the case now under consideration, this limitation is fatal to the petitioners' endeavor to maintain a lien under the law of the State of New York.

II. The next, and, in view of the pendency of other cases relating to the subject, the most important, question is whether the petitioner' had a lien independent of the statute of the State of New York; or, in another form, has one who makes repairs and furnishes materials to a domestic vessel in her home port, and in the port of the residence of her owner, a maritime lien upon the vessel?

In view of the course of decision in the Supreme Court of the United States upon that question, I do not feel at liberty in this court to enquire whether in such case a lien was given by the civil law.

If the Supreme Court should feel at liberty to recall the decisions heretofore made therein upon the question, and treat the subject as open to enquiry and determination according to the rules of the civil law, they will do so. This court is bound by the decisions of the Supreme Court as they now stand. It will therefore be sufficient
40 for the purposes of this case, and it is all that I feel at liberty to do, to state the course of decision in that tribunal.

It may, however, tend to a better and more clear understanding of

their result if I suggest that they recognize a distinction between the requisites to maritime or admiralty jurisdiction and the requisites to a maritime lien; that is to say, that the courts of admiralty have jurisdiction of all maritime contracts and maritime *toils*, but that it does not follow that in all cases of jurisdiction of the contract, or subject-matter founded on its nature as maritime, there is also a lien upon the ship or vessel.

The recognition of such a distinction by the Supreme Court is important in considering the meaning and influence to be assigned to the decisions and opinions which hold the contract for supplies and materials to a vessel, though in her home port, a maritime contract of which the courts of admiralty have jurisdiction. The enquiry, therefore, is in each case, Does the contract and its performances create a maritime lien according to the course of decision in the Supreme Court?

41 The Supreme Court in 1819, in The General Smith, (4 Wheat., 493,) recognizes the distinction above adverted to; and, while it is, in the opinion of the court given by Mr. Justice Story, distinctly stated that no doubt is entertained of the jurisdiction of the admiralty in cases of material-men, it is with unqualified distinctness held, in respects to repairs and necessaries in the port or State to which the ship belongs, that the law maritime gives or implies no lien.

In The St. Jago da Cuba, in 1824, (9 Wheat., 636,) the court sustained the claim of those who had furnished materials and supplies to a lien on the vessel, but the doctrine of The General Smith is affirmed and additional reasons given therefor.

The decision is expressly placed on the ground that the owners by their conduct were estopped to allege that she was a domestic vessel. "They are thus precluded by their own act from denying her foreign character."

In 1833 the court, in Peyroux et al. v. Howard et al., (7 Peters, 324,) re-assert the doctrine of The General Smith in the very terms of the opinion in that case. On the subject of the jurisdiction of the admiralty over our navigable rivers, subsequent cases correct the observations made in the opinion, which assume that it is limited to the ebb and flow of the tide; but that has no bearing on the subject now

42 under consideration.

In 1848 Judge Nelson, giving an opinion in New Jersey Steam Navigation Co. v. Merchants' Bank, (6 How., 344,) re-asserts the doctrine that there is no maritime lien in favor of material-men in the home port, as held in The General Smith, and it may be worthy of notice that the question chiefly discussed, and on which the Supreme Courts were divided, was whether the jurisdiction of the admiralty was even as comprehensive as was assumed in that case.

In 1857, in People's Ferry Company v. Beers, (20 How., 393,) in giving the opinion of the court that the ship-builder has no maritime lien, Mr. Justice Catron strongly re-affirms, of repairs and material, that "where the owner is present no lien is acquired by the material-men, nor is any where the vessel is supplied or repaired in the home port."

It is, perhaps, necessary to the full history of the subject to state that while the existence of the maritime lien for materials and supplies in the home port had been thus frequently denied, the right of the material-man to proceed in the admiralty in rem, when the State law gave him a lien therefor, had been distinctly allowed by the rule of court adopted in 1844.

43 In the case above mentioned the power to employ the process of the admiralty to enforce such liens was admitted. In the inferior

courts the right had been recognized, and the lien created by the State law sustained.

The distinction between cases in which the cause of action was itself within the admiralty jurisdiction, and the cases in which the admiralty had, independent of the local law, no jurisdiction, may not always have been attended to. But where, as in case of repairs and supplies to a vessel, even in the home port, the contract was itself deemed maritime in its nature, and so within the admiralty jurisdiction, notwithstanding the absence of a maritime lien, it was not deemed beyond the power of the admiralty, having acquired jurisdiction by the nature of the contract, to recognize one of the incidents of the contract, although created by the local law, and, in administering upon the subject-matter, to give effect to the lien so created.

Thus in The General Smith, Judge Story says, no lien is implied unless it is recognized by the municipal law of the State.

Mr. Justice Thompson, in Peyroux v. Howard, of the particular
44 contract relied on in that case, says: "It is a maritime contract, and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien is given by the local law, * * * it will bring the case within the jurisdiction of the court.

In The Orleans v. Pheobus, (11 Pet., 175,) Mr. Justice Story limits the apparent meaning of the observation last cited, stating that the local laws could not confer jurisdiction upon the admiralty; that they could only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States.

Hence in the case then before the court, the cause of action not being of maritime jurisdiction, the existence of a lien by the State law would not avail the libellants.

So also Mr. Justice Nelson, in The New Jersey Steam Nav. Co. v. Merchants' Bank, (at p. 390,) apparently overlooking, or at least not noticing, the distinction stated by Judge Story, states that jurisdiction has always been exercised by the admiralty courts in this country in suits by ship-carpenters and material-men for repairs and necessaries made and furnished to ships, whether foreign * * * or in the home port, if the municipal laws of the State give a lien for the
45 work and material, and he cited numerous cases from the district and circuit and Supreme Courts.

Mr. Justice Catron, however, in giving the opinion in People's Ferry Co. v. Beers et al., noticing the fact that district courts have recognized the existence of admiralty jurisdiction in rem against a vessel to enforce a carpenter's bill for work and material furnished in constructing it, in cases where a lien had been created by the local law, (e. g., Read v. Hull of a new brig, Story R., 244; Davis et al. v. A new brig, Gilpen's R., 473; Id., 536; Luddington et al. v. The Nucleus, 2 Law Journal, 563,) adds, "Thus far, however, in our judicial history no case of the kind has been sanctioned by this court." This, it will be observed, was said of a case of the building of a vessel, which the court held was not a case within the jurisdiction of the admiralty; that the jurisdiction depended upon the nature of the contract, and that a contract for the building of a vessel is not maritime.

After this decision, and as explained in the opinion of the court in Maguire vs. Cord, (11 Howard, 251,) "so as to take away the right to proceed in rem against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by State laws, it

being conceded that no such lien existed according to the
46 admiralty law," the Supreme Court by rule, to take effect May 1st, 1859, provided for proceeding in rem or in personam in suits by material-men for repairs or supplies to a foreign vessel, and for "proceeding in personam but not in rem in cases of domestic ships for repairs, supplies, or other necessaries."

By the course of decision down to that time, above referred to, the Supreme Court affirmed:

That the contract for repairs and supplies to a vessel is a maritime contract and within the jurisdiction of the district courts as courts of admiralty.

That the contracts for supplies and repairs to a foreign vessel is attended by a maritime lien in favor of the material-man or repairs, as an incident to the contract, which would be enforced in the admiralty.

That the contract for supplies and repairs to a domestic vessel in her home port is attended by no such incident. That no maritime lien is implied therein or created thereby, and although the admiralty had jurisdiction of the contract, and would sustain suits thereon in personam, there is no lien by maritime law upon the vessel itself to be enforced as such.

47 And finally, the rule last referred to affirms that such last-named contract is a maritime contract, of which the admiralty had jurisdiction, but that it creates no maritime lien upon the vessel. And the courts are forbidden to proceed in rem to enforce liens claimed in such case under State laws.

The case of Maguire v. Card, decided in 1858, at the same term at which the rule was adopted, was distinctly in point. The supplies for which a libel in rem was filed were furnished to a domestic vessel engaged in navigating the Sacramento River, and lying in the port of Sacramento. The court in that case wholly denied the jurisdiction of the admiralty of the subject-matter in any form or under any process, because the vessel was engaged in the purely internal commerce of the State.

This ground of the decision has since then been overruled. (The Belfast, 7 Wall., 624.) But the court explain the rule then recently adopted, and declare a determination to leave liens asserted under State laws to be enforced by the State courts. The language of the opinion is very broad; and yet, as it was used in a case in which the court disclaimed any jurisdiction of the contract, it may be doubted that the court
48 intended to hold that, where upon other grounds the admiralty had jurisdiction to arrest and sell a vessel in a proceeding in rem, they would not recognize the existence of a lien created by State laws in the adjustment of the rights of parties intervening for their interest.

That the local laws could not confer jurisdiction upon our courts of admiralty was again affirmed in Roach et al. v. Chapman in 1859. (22 How., 129.)

In 1861, in the case of the St. Lawrence, (1 Black, 522,) the subject is fully reviewed by Chief-Justice Taney. He gives the reason for the former rule of 1844, and for its abrogation in 1859; recognizes the distinction between the cases in which the admiralty has no jurisdiction of the subject-matter, and can acquire none by virtue of the local or State laws, and those in which, having jurisdiction of the contract, as maritime, they had recognized the lien upon the vessel which the State laws created. He places the authority to make and to charge the rules referred to, not upon the principles of admiralty law, conclusively determining by that process its jurisdiction should be exercised in any particular case, but

on the authority conferred by statute on the Supreme Court in its
49 discretion to prescribe the process and modes of proceeding where jurisdiction does exist.

Thereupon, holding that the rule of 1859 was prospective only in its operation, the court hold the libellant entitled to the benefit of the proceeding he had taken before that rule was adopted; and, the contract for supplies being maritime, and within the jurisdiction of the court, held also that a decree condemning the vessel should be affirmed.

The case of The Moses Taylor, (4 Wallace, 411,) and The Hine v. Trevor, (4 Wall., 555,) decided in 1866, are important to the question whether and to what extent State laws purporting to create liens in cases embraced in the jurisdiction of the admiralty, and to provide a proceeding in rem for their enforcement, have any validity whatever. But on the single question whether there exists a maritime lien for repairs and supplies to a domestic vessel in her home port, they make no change in the course of decision already recited.

In 1868, in the case of The Belfast, in which the court overruled prior decisions restricting the jurisdiction of the admiralty to tide-waters, the court re-affirmed the decisions last above mentioned, and in the opinion Mr. Justice Clifford says: "State legislatures have no authority
50 to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding in rem as practiced in the admiralty courts." It will be seen that, as above stated, the court had already held that the States could confer no jurisdiction of any kind upon the United States courts. Again he says: "Such a (maritime) lien does not arise in a contract for materials and supplies furnished to a vessel in her home port;" and again, "Contracts for ship-building are held not to be maritime contracts;" and, "In all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding in rem is exclusive in the district courts of the United States."

He expresses the opinion, however, that in reference both to contracts not maritime and to contracts out of which (although maritime) no lien arises, it is competent for the States, under the decisions of the Supreme Court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.

In 1869, in the case of The Kalerama, (10 Wallace, at p. 211,)
51 Mr. Justice Clifford, again adverting to the proposition that no maritime lien arises for supplies furnished in the home port, declares that the Supreme Court have put the doubt once existing on that subject at rest.

In 1870, in the case of Leon v. Galceron, (11 Wallace, 185,) the meaning and effect of the decisions in The Moses Taylor and The Hine v. Trevor, above referred to, are considered, and the opinion delivered in The Belfast is affirmed and applied, where the action was brought in personam in a State court by mariners having a maritime lien for wages, and having also by the State law a right, in the nature of a lien, to have the vessel seized by writ of sequestration to be held as security for the judgments which they might recover in such action. The legality of such a proceeding was affirmed; but the opinion reiterates, as in The Belfast, that a maritime lien does not arise in a contract for materials and supplies furnished to a vessel in her home port.

In the face of this continuous declaration of the Supreme Court, that no maritime lien exists in a case like the one under consideration, in

effect that the libellants had no lien upon the ship Edith for repairs and materials done and furnished in her home port, I am
52 asked to declare that such maritime lien does exist, and to decree to the libellants a portion of the proceeds of her sale to the exclusive of mortgagees and the assignee in bankruptcy of her owner. Having arrived at the conclusion that the libellants are not so entitled by virtue of the provisions of the State statute, their claim must rest solely upon their alleged maritime lien. On the questions, what was the rule of the civil law, and what should be the influence of authorities cited thereon, or of the early authorities cited by counsel showing the recognition of the rule of the civil law in this country, I am not called upon to express an opinion. If I deemed the course of decision which I have collated to have originated in misapprehension and to be erroneous, it would neither be decorous nor proper for me so to hold. I am aware that many and very important limitations of the jurisdiction of our courts of admiralty, declared in former decisions of the Supreme Court, have within a few years past been held by the same court erroneous, and the cases containing them overruled.

Both as to waters over which jurisdiction is to be asserted and
53 as to contracts and torts once deemed not to be of admiralty cognizance, the court now asserts and exercises jurisdiction.

Possibly the court is now ready to affirm the existence of a maritime lien in the case under consideration; but it is for the Supreme Court itself, and not for the circuit court, to assume to disregard the decisions of the former tribunal heretofore made on the subject.

III. It is suggested that the Supreme Court has acted in this matter, and by a more recent rule has practically overruled all the denials that material-men have a maritime lien on the vessel which are found in the previous decisions.

On the 20th of May, 1872, the court ordered that the twelfth rule in admiralty, above adverted to, be amended so as to read as follows: "In all suits by material-men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight in rem or against the master or owner alone in personam."

I am furnished with some decisions in the district courts which are claimed to hold that by force of this rule they are bound to hold that the decisions of the Supreme Court in the past are now overruled, and that contracts for supplies do now create a maritime lien.

54 The rule has no such necessary interpretation, and I think it becomes this court, before acting upon it as authority for so holding, to await some more decisive declaration from the Supreme Court.

1. In The St. Lawrence (ubi supra) the Supreme Court state the foundation of their authority to make the rule of 1858, (now amended,) and they define its scope and meaning. Their rules are not made for the purpose of changing the law. The jurisdiction and power of courts of admiralty in this country are declared in the Constitution and vested in the courts, who possess and exercise them, by the acts of Congress. The Supreme Court does not assume to change the law. Their rules are rules of practice. They are made and altered as the court, in its discretion, sees fit, under acts of Congress empowering that court from time to time to prescribe and regulate and alter the forms of units and other process to be used in the district and circuit courts of the United States, and the forms and modes of framing and filing libels * * * and other proceedings * * * in admiralty, and making the forms and modes of proceeding according to the principles, rules, and usages

of courts of admiralty, subject to such alterations and additions
55 as the courts deem expedient, or to such regulations as the Supreme Court shall think proper by rule to prescribe.

The Supreme Court does not assume to vest new rights not before recognized by the maritime law. It does not regulate the practice by which rights vested by law may be prosecuted and maintained, and by which wrongs may be redressed. It acts in reference to the remedy, the means of enforcing rights, or of obtaining redress for their violation.

This is, in substance, the exposition given by the Supreme Court itself as a vindication of the former rule in the case last referred to.

The court, therefore, does not by force of its rules create a maritime lien, where, by the law maritime, none exists. It may assume to furnish a means of obtaining a lien as a security for the judgment which may be rendered by the court.

That is in analogy to all seizures and attachments wherein a lien or right to hold the subject seized to secure the judgment which the court may pronounce is gained by service of the process upon property. Neither the right to such a process nor the use of such a process does per se import the existence of a prior lien.

2. In the St. Lawrence the court declared the rule of 1858
56 prospective only in its operation. Regarding the new rule simply as the allowance of a form of remedy, this view of the prospective operation of the rule is fatal to the libellants in this case; for before the libel was filed upon which the ship Edith was sold her owner was adjudged a bankrupt and an assignee appointed, and before the rule in question was adopted the sale had taken place, and the rights of the parties had become fixed. The petition now before us was filed, the order appealed from was made, and the present appeal was taken before the new rule was adopted.

The petitioners, in short, have taken no proceeding, either in form or substance, under the rule, and derive no benefit therefrom, if it be regarded only as a means of collecting the money due them.

3. It may be suggested that the Supreme Court, by the new rule, though it did not intend to overrule the former decisions and assert the existence of a maritime lien for supplies furnished in the home port, did intend to return to the practice which had obtained in the district courts under the rule of 1844, with the sanction of the Supreme Court, before the rule of 1858 was adopted; that is, it intended to recog-
57 nize the contract, as had been done before, as a maritime contract, and to enforce the lien on the vessel, if and whenever a lien was given for such supplies for the State law. And so the court is made to recognize the State lien as a right in the property which the court of admiralty is bound to recognize in its dealing with the ship or the proceeds of her sale.

Having concluded that the present petitioners have now no lien under the State law, this construction of the rule will avail nothing to them. But the claim to such a construction is liable to this criticism. The rule is general. It gives process in rem in all cases, without any reference to State laws as a condition therefor. It is not to be supposed that the court intended to give the process in rem in all cases, but to make the utility of the proceeding in that form and its efficiency as a security to depend upon the State law. That would again involve the subject in all the embarrassments suggested as reasons for the rule of 1858, and call upon the United States court to deal, in the very use of its process, with the construction and effect of State laws creating liens, or claimed to do so, and with the various questions of priority which

may arise under those statutes—questions with which State courts are more competent to deal.

So far as the new rule of the Supreme Court operates upon the
58 subject, there seems but one alternative: 1st. That rule is to be held a repudiation of the prior decisions, and an affirmative recognition of the existence of a maritime lien eo instante supplies and repairs are furnished; or, 2nd. the rule is a mere rule of practice—a rule prescribing process by which the ship can be attached or seized and held as a security and for the collection of the demand.

In this latter view, the lien or right of detention does not arise until the process is issued; and the seizure under the process, like the levy of process of the admiralty, in the nature of a foreign attachment where the debtor has absconded, operates upon the thing seized in the condition in which it is found, and without displacing just liens of third parties prior in their nature. As suggested in a former part of this opinion, the court could not have intended that, although no maritime lien exists in favor of the material-man, he may, nevertheless, by process in rem, obtain a priority to which he was not, as against third parties, entitled, or that even if the State law had given him a lien, he could thereby displace liens which exist by force of the maritime law, and which, by the principles of that law, the court is bound to sustain.

59 It is quite true that this latter construction of the rule raises many interesting questions touching the rights of third persons, and, as the case may be, the enquiry whether, when the vessel has passed into the hands of third persons, bona-fide purchasers, before such process issues, it will affect their titles. But, as already suggested, I do not deem it fitting that the circuit court should act in disregard of the repeated and consisted declarations of the Supreme Court, and contrary to its express decisions on the precise point, without some utterance from that court more clearly expressing an intent to overrule those decisions than is found in this rule of court.

4. Another alternative view of the construction and effect of the new rule is suggested, namely: That without discriminating between supplies furnished to a foreign and supplies furnished to a domestic vessel, the rule permits the creditor to elect this form of remedy and maintain his proceeding, if he can.

If, by reason of the foreign character of the vessel, or facts constituting an estoppel, or either circumstances which create or imply it, a maritime lien is established, the process in rem will be successful. But unless a maritime lien is established, the libel in rem must be dis-
60 missed. Otherwise the court would be deemed to create a lien by judicial legislation, when the power to do so is not conferred upon the court, either by act of Congress or the Constitution. To hold that the court can create such a lien, save by process, which operates when the seizure is made, and not until then, as security for the debt, would be to contradict the clear declaration of Chief-Justice Taney in the St. Lawrence, (1 Black, at p. 529:) "The process in rem, or priority, given for repairs or supplies to a domestic vessel by the courts of admiralty, in the courts where the principles of the civil law have been adopted, form no part of the general maritime code and no part of the admiralty and maritime jurisdiction conferred on the Government of the United States."

Without considering this alternative further, or the force of this constitutional objection, it confirms me in the belief that I ought not to consider a proposition open to assertion in this court which in the Supreme Court has been declared at rest for nearly sixty years, and which that court "has constantly maintained." (10 Wall., 212.)

It is a relief to me that the amount in controversy in this and
61 in some other cases involving the same questions is sufficient to warrant a review of the decision I feel constrained to make, and it is to be hoped that we may soon have the declaration of the Supreme Court on the precise question before any final injustice is done to the parties.

The fund in this case must be distributed in conformity with the decree made in the district court. As no other party appeals except the claimants for repairs and materials, no question is made here except the one which has been considered.

Let a decree be entered accordingly, with costs to the appellees.

A copy.

KENNETH G. WHITE, *Clerk.*

(Endorsed:) Circuit court of the United States for the southern district of New York. D. Freeman Poole et al. vs. The supplies & repairings of the ship Edith. Woodruff, Circuit J. Filed Feb. 19, 1874.

62 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Friday, the thirteenth day of March, in the year of our Lord one thousand eight hundred and seventy-four.

Present, the honorable Lewis B. Woodruff, circuit judge.

THE SURPLUS AND REMNANTS OF THE SHIP Edith, and Daniel Tyler, appellees, *ads.* D. FREEMAN POOLE, A. JUDSON BUCKMAN, & John E. Leach, appellants.

This cause coming on to be heard, on the appeal of D. Freeman Poole, A. Judson Buckman, and John E. Leach, from the final decree of the district court of the United States for the southern district of New York, overruling the exceptions to the report of the referee, filed by John Sedgwick, as assignee in bankruptcy of Charles Carow, and by the above-named appellants, and sustaining the exceptions filed by Daniel Tyler, appellee herein, and the claim of said appellee having been paid pursuant to the decree of the district court, notwithstanding the appeal taken therefrom to this court, and having been heard on the pleadings and proofs in the district court, and argued by the advocates
63 of the respective parties, and deliberation having been had in the premises:

Now, on motion of Vose & McDaniel, proctors for said appellee, it is ordered, adjudged, and decreed that said final decree of the district court be, and the same hereby is, in all things affirmed, with costs of the appellee on the appeal to this court, amounting to the sum of seventy-two $\frac{80}{100}$ dollars.

And it is further ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time prescribed by law and the rules and practice of this court, that a summary judgment be entered against the appellant aforenamed and Charles Donohue, the surety on the appeal herein, for the said sum of seventy-two and $\frac{80}{100}$ dollars, with interest thereon from the date hereof. And it appearing to the court that the surplus and remnants of the ship Edith having been distrib-

uted in accordance with the decree of the district court, it is further ordered that said distribution be, and the same is, hereby ratified and confirmed.

(Signed) L. B. WOODRUFF,
Circuit Judge.

64 Circuit court of the United States for the southern district of New York, in the second circuit, in admiralty.

D. FREEMAN POOLE, A. JUDSON BUCKMAN, and John E. Leech, petitioners & appellants,
vs.
THE SURPLUS AND REMNANTS OF THE SHIP Edith, Daniel Tyler, claimant & appellee.

The above-named petitioners and appellants, conceiving themselves aggrieved by the decree of the circuit court, do hereby appeal from the same, and every part thereof, to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the matter, duly authenticated, may be sent to the said Supreme Court.

Dated April 18, 1874.

BEEBEE & DONOHUE,
Proctors for Applts.

To KENNETH G. WHITE, Esq.,
Clerk of C. Court, United States.
VOSE & MCDANIELS, Esqs.,
Proctors for Appellees.

65 (Endorsed:) U. S. circuit court. D. Freeman Poole & ors., petitioners & applts., vs. Daniel Tyler, claimant of the surplus and remnants of the ship Edith, appellee. Notice of appeal. Beebe & Wilcox, proctors for applts.

We admit due service of notice, of which the within is a duplicate. Dated April 22d, 1874.

VOSE & MCDANIEL,
Proctors for Appellees.

Filed April 22, 1874.

66 In the Supreme Court of the United States, in admiralty.

D. FREEMAN POOLE, A. JUDSON BUCKMAN, and John E. Leech, petitioners & appellants,
vs.
DANIEL TYLER, CLAIMANT & APPELLEE OF the *the* surplus & remnants of the ship Edith.

To the honorable the Supreme Court of the United States:

The petition of appeal of the above-named libellants and appellants, D. Freeman Poole, A. Judson Buckman, and John E. Leech respectfully showeth:

That on or about the first day of April, 1871, The New York Harbor Tow-Boat Company exhibited their libel of complaint in the district court of the United States for the southern district of New York against the ship Edith, her tackle, apparel, and furniture, and upon which process was duly issued and the said ship attached; and that such proceedings were thereupon had that by the judgment and decree of the
67 said court in the said action, said ship was duly sold under a "venditioni exponas" and the proceeds brought into the registry

of the said court. That on or about the 17th day of May, in the year aforesaid, your petitioners filed their petition in the said court against the said surplus and remnants, and claiming in and by their said petition as being due and owing to your petitioners a sum of exceeding two thousand dollars, and praying, among other things, that the said district court would be pleased to order and direct that the claim of your petitioners be paid out of said surplus and remnants.

That such proceedings were thereupon afterwards had that by the judgment and decree of the said district court rendered in said application on or about the 12th day of January, 1872, the said petition of your petitioners was dismissed, with costs to be taxed.

That after such final decree your petitioners duly appealed therefrom to the circuit court of the United States for the southern district of New York in the second circuit; and the said cause was thereby removed into the said circuit court of the United States aforesaid. That thereafter the said action was heard before the said circuit court upon
68 the same pleadings, evidence, and proceedings as in the said district court as set forth and contained in the transcript of the record transmitted from the said district court to the said circuit court and therein filed, and such proceedings were had in the said circuit court of the United States for the southern district of New York, in the second circuit, that by the judgment and decree of the said circuit court, entered on the thirteenth day of March, 1874, the said final decree of the said district court was in all things affirmed with costs.

Which said decree of the said circuit court is erroneous and ought to be reversed, inasmuch as, among other things, the said decree of the said circuit court should have reversed the decree of the said district court, and should have adjudged and decreed that the claim of your petitioners should by the order and decree of the said circuit court, ordered and adjudged to be paid out of the said surplus and remnants of the said ship Edith.

Wherefore these petitioners and appellants appeal to the Supreme Court of the United States from the whole of the said decree of the said circuit court, and respectfully pray that the said decree of
69 the said circuit court, and the petition, pleadings, depositions, evidence, and proceedings in the said action may be sent to the Supreme Court without delay, and that the Supreme Court will proceed to hear the said cause anew; and that the said decree of the said circuit court may be revised, and a decree made adjudging, ordering, and directing that the claim of your petitioners, with interests and costs, shall be paid out of the said surplus and remnants of the said ship Edith, or such other decree to the said Supreme Court shall seem just.

BEEBE & WILCOX,
For Petitioners & Appellants.

(Endorsed:) Supreme Court of the United States. D. Freeman Poole & ors., petitioners & appellants, vs. Daniel Tyler, claimant of the surplus & remnants of the ship Edith, appellee. Petition of appeal. Beebe & Wilcox, for petitioners & appellants.

We admit due service of a petition of appeal which the within is a duplicate.

April 22, 1874.

VOSE & McDANIEL,
Proctors for Appellee.

Filed April 22, 1874.

70 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

D. FREEMAN POOLE, A. JUDSON BUCKMAN, & John E. Leech, petitioners & appellants,
vs.
THE SURPLUS AND REMNANTS OF THE SHIP Edith, Daniel Tyler, claimant & appellee.

Know all men by these presents that we, John E. Leech and Robert Murray, of the city of Brooklyn, are held and firmly bound unto the above-named Daniel Tyler, claimant & appellee, in the sum of two hundred & fifty dollars, to be paid to the said Daniel Tyler, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named D. Freeman Poole, A. Judson Buckman, & John E. Leech have prosecuted their appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named D. Freeman Poole & others shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN E. LEECH. [L. S.]
ROBT. MURRAY. [L. S.]

Sealed and delivered and taken and acknowledged this 26th day of March, 1874, before me as to Leech, & the 27th of March as to Murray.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

71 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John E. Leech and Robert Murray, each for himself, being duly sworn, deposes and says that he resides in the city of Brooklyn; that he is worth the sum of five hundred dollars over and above all his just liabilities.

JOHN E. LEECH.
ROBERT MURRAY.

Sworn to this 26 day of March, A. D. 1874, before me as to Leech, & the 27th as to Murray.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Indorsed:) Vol. , page . U. S. circuit court. D. Freeman Poole, A. Judson Buckman, & John E. Leech, petitioners & appellants, vs. The surplus & remnants of the ship Edith, Daniel Tyler, claimant & appellee. Bond for costs on appeal to Supreme Court. Beebe & Donohue, proctors. Filed this 22d day of April, 1874.

We approve of the form & sufficiency of the within bond.
April 22, 1874.

VOSE & McDANIEL,
Proctors for Appellees.

72 Supreme Court of the United States. In admiralty.

D. FREEMAN POOLE, A. JUDSON BUCKMAN, and John E. Leech, petitioners & appellants,
vs.
DANIEL TYLER, CLAIMANT OF THE SURPLUS and remnants of the ship Edith, appellee.

UNITED STATES OF AMERICA, *ss:*

To the above-named appellees, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on the second Monday of October, 1874, pursuant to an appeal from a decree of the circuit court of the United States for the southern district of New York, in the second circuit, wherein D. Freeman Poole and others above named are petitioners and appellants and you are appellee, to show cause, if any there be, why the said decree should not be corrected and speedy justice done to the parties in that behalf.
April 23d, 1874.

SAML. BLATCHFORD.

73 (Endorsed:) Supreme Court of the United States. D. Freeman Poole & o'rs, petitioners & app'l'ts, vs. Daniel Tyler, claimant, &c., appellee. Citation on appeal. Beebe & Wilcox for appellants.

Due service of a copy hereof is hereby admitted.
April 23d, 1874.

VOSE & McDANIEL,
Proctors for Appellees.

74 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 73, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of D. Freeman Poole & o'rs, petitioners & appellants, against Daniel Tyler, claimant of the surplus and remnants of the ship Edith, appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 16th day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninty-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsement on cover:) No. 187. D. Freeman Poole, A. Judson Buckman, & J. E. Leech, appellants, vs. Daniel Tyler, claimant of the surplus & remnants of the ship Edith. S. New York C. C. U S. Filed 17th October, 1874.

U. S. SUPREME COURT.

D. FREEMAN POOL, *et al.*,
Appellants,

vs.

DANIEL TYLER, CLAIMANT OF THE SURPLUS AND REMNANTS OF THE SHIP "EDITH,"
Appellee.

Appellant's Points.

This case comes up on appeal from the decree of the Second Circuit, affirming the decree of the District Court for the Southern District of New York, which sustained the Report of the Commissioner to whom it was referred to take proof and report the amount due to the above named appellants, petitioners against the surplus proceeds of the ship "Edith" in the registry of the Court.

The claim of the said petitioners, appellants, was for repairs and materials amounting to $3,470.70 furnished to said vessel at the port of New York, in July, 1870. Her owner at the time was a resident of the State of New York.

The petitioners have prosecuted the remedy given them under the act of the State of New York, entitled "an act to provide for the collection of demands against ships and vessels" passed April 24, 1862, in the New York State Courts. The New York Court of Appeals affirming the New York

Superior Court, 37 N. Y., Superior Court, p. 5) Jones & Spruce) 114, held, substantially, that such proceeding was an admiralty proceeding of which the District Court of the United States had exclusive jurisdiction, and dismissed the proceeding.

The decree of the Circuit Court of the United States herein (March, 1874,) was before the decision of the case of the Lottawanna, (21 Wal. 558, October, 1874,) in this Court, and before the decision of the case Poole *vs.* Kermit, (January, 1875,) 59 N. Y. R. 555.

The learned Circuit Court held (fol. 59,) that to uphold a lien would be a disregard of the declarations of this Court, made in some of its former decisions, which he could not do without some utterance from the Court more clearly expressing an intent to overrule such decisions than was found in the rule amendatory of the 12th Admiralty Rule, and adds (page 24,) "*It is a relief to me that the amount in controversy in this case * * * is sufficient to warrant a review of the decision I am now constrained to make, and it is to be hoped that we may soon have the declaration of the Supreme Court on the precise question before any final injustice is done to the parties.*"

That declaration we may add has since been made in the case of the "Lottawanna" Supra, and places at rest the main and only question in this case, to wit, did the petitioners have a lien enforceable in Admiralty against the rem or the proceeds thereof in the Registry of the Court?

Following the doctrine of the "Lottawanna," the second circuit, (Johnson, J., successor of Woodruff, J.,) has upheld the lien and the constitutionality of the act of 1862, of New York, in the case of the John Faron unreported; we submit opinion:

Walsh *vs.* The John Faron, Nov. 1876.
See also Tracy *vs.* "Virginia Ruland,"

May Term, 1876, Second Circuit, E. D. N. Y.
Hunt, J.
"Hezekiah Baldwin," E. D., N. Y., 1876.
Prop. "W. T. Graves," N. D. of N. Y.
Dec. '76. 14 Albany Law Journal 408.

The petitioners, having prosecuted their remedy to the highest Court of New York, from which no right of review lay in such case, to this Court, respectfully submits that this Court under the doctrine of the case of the "Lottawanna," followed by the decisions above cited, will give that relief to which they are entitled, legally and equitably, either under the state or maritime law, for the reasons:

I.

The claim arose out of a maritime contract.

II.

By the Act of April, 1862, of New York, (supra,) such a claim was made a lien, and such lien followed the proceeds into the Registry of the Admiralty, the District Court of the Southern District of New York.

Lady Franklin, 2 Bissell, 121 Island City, 1 Lowell, 375.

III.

It became then, a lien superior to the claim of the mortgagee or the Assignee in Bankruptcy. Indeed the whole case below, turned on the one point,

whether the petitioners had such a lien under the State laws as was enforcible in admiralty—that granted, and the petitioners must of necessity have been paid to the exclusion of the mortgagee and assignee.

"Lady Franklin," 2 Bissell, 121.
Prop. "W. T. Graves," *supra.*
"Hezekiah Baldwin," *supra.*
"Virginia Rulon," *supra.*
"John Faron," and *supra.*

(*a.*) The Act of New York (*supra*) expressly makes it a lien *and expressly declares its priority over every other claim or lien except seamen's wages.*

If the State legislature had the power as the "Lottawanna" holds, to fix the lien, it follows that it had the power to declare its priority.

(*b.*) This is in conformity with the genius of the Admiralty law and the decisions.

Dr. Lushington says: "The mortgagee's interest is derivative from the owner, and in no respect superior thereto."

The "Mary Ann" four notes of cases 376, cited; 7 Law Reporter, N. S., p. 108.

The word "lien" in a State statute where applied to supplies furnished by material men on a domestic vessel, means a *maritime lien* similar to liens for supplies on foreign vessels.

The Young Mechanic, 2 Curtis Rep., at pp. 405, 406. See the language of the United States Supreme Court in the Lottawanna, 21 Wal., at p. 580.

IV.

A mere chattel mortgage on a ship is not a maritime contract, and cannot, therefore, be foreclosed by an Admiralty Court.

Bogart *vs.* The Steamboat "John Jay," 17 How., U. S. Sup. Ct. Rep., p. 399.
The "Angelique," 19 How., 239.

(*a.*) Even when given for part purchase money, and before any regular maritime lien accrued, even though duly filed and recorded in compliance with the United States and State laws, still mortgagees cannot claim a surplus in Court, untill after creditors under maritime contracts are paid in full.

The Hendrick Hudson 7 Law Rep. N. S. 193.

The Young Mechanic cited above. We hardly think this will be controverted here, as it was conceded below ; the only question being as to the lien of the petitione s.

The Favorite ~~and~~ Chicago Legal News, 395.
Prop. W. T. Graves, (*supra.*)

(*b.*) The material man enhances the value of the vessel and his services, in supplying new sails and rigging and repairing injuries from collision often tend to save the ship from a destruction which would sink the security with the vessel.

(*c.*) The fact that this libellant's lien can be enforced by the Admiralty Court while the mortgagee's lien cannot be foreclosed, show that the material man's lien is a maritime lien, while the mortgagee's is not, and is therefore superior

in contemplation of the Admiralty Court to the mortgagees.

(*d.*) As to whether a mortgagee can enforce his claim against the proceeds in Admiralty was doubted in the Fortitude 2 Wm. Robinsons, R. 217.

V.

This being the case it follows conclusively that the claim of the assignee in bankruptcy is subordinate to it, for the remedy sought by the petitioners is in no sense a *mesne* process or attachment against the property of the owners of the vessel, (see Bankrupt Law), but a proceeding *in rem* to foreclose a lien given by Statute founded upon a maritime contract—in other words, if there was a lien, the vessel, or its proceeds to that extent, became the property of the petitioners, and was not the property of the bankrupt subject to levy or seizure under *mesne* process against the ship owner. "Young Mechanic" (*supra*).

But again we remark that the whole question is conceded when the lien is collected.

See article entitled "Peculiarities of Maritime Liens," 5 Law Reporter, (Little & Brown, 1853), page 556.

"With these maritime liens no other debt, not even a mortgage of a vessel itself, can compete, but the Court of Admiralty, with entire disregard of their existence, whatever their number and amount may be, will sell the *res*, to discharge its own peculiar liens."

"Lady Franklin," 2 Bissell, 121.
John Durfin, E. D. of N. Y., 1876, unreported (where this point was expressly decided).

VI.

(*d.*) There was some controversy between Tyler and the said assignee as to their relative rights, but the decision of the Court thereupon is not appealed from by either of them.

VI.

The "Lottawanna" *supra*, is conclusive of the whole matter, and the decree below should be reversed.

BEEBE, WILCOX & HOBBS,
Proctors for Appellants.

F. A. WILCOX, *of Counsel.*

U. S. SUPREME COURT.

D. FREEMAN POOLE, *et al.*,
Appellants,

vs.

DANIEL TYLER, Claimant of the surplus and remnants of the ship Edith,
Appellee.

Supplemental Points on part of Appellants.

The Statute of New York, April 24, 1862, Chap. 482, provides that the debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire, the vessel shall be absent from the port at which such debt was contracted, in which case the lien shall continue until the expiration of ten days after such vessel shall return to said port.

The debt was contracted in July, 1870; and the lien filed July 27, 1870. The vessel had always been engaged in foreign trade, and cleared July 22, 1870, and sailed a day or two after, (p. 2–3 transcript.)

The petition herein was filed May 17, 1871; at that time proceedings had been commenced under the State Act (fol. 5,) and in that proceeding no point was ever raised that the lien had expired.

The argument of the appellee proceeded on the

ground that there never had been a lien, because the statute fixing the lien, or at least providing for an admiralty remedy to enforce that lien, was unconstitutional.

I.

This court must therefore presume such point in favor of the appellant.

II.

But it may be contended that the proceeding to enforce such lien being unconstitutional that, therefore, it did not operate to prevent the outlawing, so to speak, of the lien.

To which we reply that to such extent the proceeding must be conceded to have force, even though the proceeding to enforce the lien were unconstitutional.

III.

But the presumption is that the ten days next after the return of the vessel had not expired when the petition herein was filed, May 17, 1876.

(*a.*) The vessel was engaged in foreign trade, and left the port July 22, 1870, and there is no proof of her return. When the state proceedings were taken does not appear from the transcript. *Non constat*, they were commenced simultaneously with the proceedings herein.

(*b.*) There is no evidence to support the finding of the commissioner that the vessel was sold under

the decree of the district Court, May 8th, 1871. But if that be the fact, still the petition was filed nine days before, and the proceedings of sale may have been summary or by consent.

(*c.*) But it does not follow, that because the vessel had been within the jurisdiction of the District Court for Southern District of New York, that the vessel was within the jurisdictional limit of the State of New York, or the port of New York, as the Act reads. For the jurisdiction of the District Court extended much beyond the limits of the port of New York. Its jurisdiction extended to low water mark on the New Jersey side of the port of New York, and the District Court would have acquired jurisdiction over her lying fast to a wharf on the New Jersey side. The U. S. Marshal could seize her there, but the sheriff of the county of New York could not.

THE JULIA LAWRENCE.

The words "return to port," in the statute, obviously must be construed to mean a return within the jurisdictional limits of the State of New York, where the vessel could be seized, if it should not be taken in the more restricted sense even of the port of New York. The jurisdictional limits of the Southern District of New York extend much beyond the port of New York, to Renssalear and Albany Counties on the Hudson River, and to Suffolk County, on Long Island Sound.

There was, therefore, a valid and subsisting lien on the vessel and the proceeds at the time of filing the petition herein.

But would the Court decree payment of the mortgage claim, where there is no maritime contract, and where the Court would entertain no jurisdiction *in rem.* to foreclose the same (The John Jay, *supra*), to the exclusion of a claim founded on a maritime contract? Would not the mortgagees stand

in exactly the same footing as the owner of the vessel.

The "Mary Ann," 4 notes of cases 376, cited 7 Law Reporter (N. S.) p. 108. The "Fortitude," 2 Wm. Robinson's Rep. 217.

Barque Harrison, 1 Sawyer, 353.
Island City, 1 Lowell, 375.

A proceeding *in rem.* and a petition for payment out of the proceeds of sale in the registry, are distinct proceedings. The former proceeds on the principle of a lien, the latter not. The Court of Admiralty, in the distribution of proceeds, proceeds more as a Court of Equity; and in this case should decree payment without regard to whether there was a lien or not, but whether there was a maritime contract or not, as between material men and the vessel owners or parties claiming title under them.

BEEBE, WILCOX & HOBBS,
Proctors for Applt's.

F. A. WILCOX,
Of Counsel.

U. S. Circuit Court.

SOUTHERN DISTRICT OF NEW YORK.

JOHN F. WALSH,
Libellant and Applt.,

vs.

Steamboat "JOHN FARGN, alias ELLA M. STEVENS," her tackle, &c.,

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JOHNSON, Cir. Judge.

Since the decision of this case in the District Court, the Supreme Court of the United States, in the case of the Lottawanna, 21 Wall, 558, has declared the law in regard to some questions which conflicting views were entertained by different judges.

It must now be deemed settled, that material men furnishing repairs and supplies to a vessel in her home port, do not thereby acquire any lien upon the vessel by the general martime law as received in the United States.

But that so long as Congress does not interfere to regulate the subject, the right of material men furnishing necessaries to a vessel in her home port, may be regulated in each state by state legislation. That such contracts are maritime, and fall within the domain of the admiralty jurisdiction, and that when in such cases a lien is given by the

State Laws, such lien may be enforced by the District Courts of the United States, under the 12th rule as modified by the Supreme Court of the United States, May 6th, 1872.

This view is maintained to be the law by the Supreme Court, while admitting that the practice may be somewhat anomalous upon the ground that it has existed from the origin of the government, and that whatever may have been its origin, and whether it was or was not based upon the soundest principles it *has* become firmly settled, it is now too late to question its validity.

These must be accepted as the controlling views of the Supreme Court upon this subject and must be followed by this court.

In the cases of the Edith and the Circassian, 11 Blatchford 457, 472, decided in this Circuit in February, 1874, the views expressed by my learned predecessor must yield to the later judgment of the Supreme Court, in the case of the Lottawanna, in so far as they are not in harmony.

The principal point of difference material in this case, is in respect to the power and rightfulness of maintaining the lien created by State legislation, while disregarding as unconstitutional, the provisions of State statutes which attempt to confer upon State Courts the power to proceed *in rem* in enforcement of such liens. It is this anomaly which the Supreme Court accepts as the law, and which therefore, it is the duty of this Court to act upon.

In the Courts of New York (*in re* Josephine, 39 N. Y., 19, and Brookman *vs.* Hamill, 43 N. Y., 554), the State lien law was held to be unconstitutional because it attempted to give process in rem, and thus was held to invade the grant of admiralty jurisdiction of the United States. The adjudication did not go beyond the validity of the proceeding in rem, and therefore the provisions for the lien in the specified cases remains to be enforced when the contract is maritime in the Court of Admiralty. The decisions in the Edith and the Circassian were

made in view of the law, as it was at the time understood, and also in view of the possibility that the Supreme Court might determine the law to be that material men had a maritime lien in the case of the domestic vessel and in the absence of any State law conferring a lien. I am therefore, of opinion that the State law conferring a lien may in case of a maritime contract be availed of in the Courts of Admiralty.

The State law gives a lien whenever a debt shall be contracted by the master, owner, charterer, builder or assignee of any ship or vessel or the agent of either of them within this State, for either of the following purposes: on account of work done or materials or other articles furnished in this State for or towards the building, repairing, fitting, furnishing or equipping such a ship or vessel. (Laws of New York, session of 1862, ch. 482, 4 ed., State at large, 653.)

SUPREME COURT

OF THE UNITED STATES.

D. FREEMAN POOLE and others, Appellants,

versus

DANIEL TYLER, Claimant of the Surplus and Remnants of the Ship EDITH, Appellee.

No. 187.

Brief for Daniel Tyler, Appellee.

STATEMENT OF FACTS.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New-York, affirming the decree of the District Court. The decision of the Circuit Court is reported in 11 *Blatchf.* 451; that of the District Court in 5 *Bened.* 432.

The case came before the District Court upon the petition of the present appellants, to be paid the amount of certain repairs done by them to the ship Edith, out of her surplus and remnants in the registry of the Court. (P. 1.) Upon this petition an order of reference was made to Commissioner Osborn, when the following facts appeared:

In 1870, Daniel Tyler had a second mortgage on three-quarters of the ship Edith. The mortgage contained a covenant of warranty. (P. 11, marg. pages 22, 23.) Bowring & Co. had a first mortgage on half of the vessel. Subject to these mortgages, she belonged to Charles Carow. He was adjudicated a

bankrupt January 28, 1871, and John Sedgwick became his assignee. The ship was libelled April 1, 1871, for a bill for towage, (p. 25, marg. page 66,) and was sold May 8, 1871, under a decree of the District Court in Admiralty. (P. 3, marg. page 6.) These various parties interposed claims to the surplus. The claim of the appellants, who composed the firm of Bucknam & Co., was for repairs done to the ship in her home port in July, 1870. (P. 2, marg. page 4.) They claimed to have acquired a lien upon the Edith under the statute of New-York, (*Session Laws* 1862, ch. 482,) and under the general maritime law. She was a sea-going vessel, engaged in foreign commerce. She was seized in January, 1871, by the Sheriff, under a warrant issued out of the State Court to enforce this lien, and the owner gave a bond in order to effect her release. An action on this bond was brought before the filing of the petition in Admiralty, and was then pending. (P. 2, marg. p. 4.) The decision of the District Court was adverse to the claim of Bucknam & Co., and they appealed to the Circuit Court. The assignee in bankruptcy did not appeal.

First.

At the time the petition was filed the petitioners had no lien upon the ship Edith, under the provisions of the statute of New-York. That lien had expired. Section 2 of the Act of 1862, Chapter 482, Laws of that year, (4 *Edmonds' Stat.* 654,) is express: "Such debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire, such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall next return to said port."

The debt in this case was contracted in July, 1870. The petition was filed May 17, 1871, (p. 1, marg. page 2,) more than six months after the debt was contracted, and more than ten days after the ship returned to the port of New-York, where the work was done. She was libeled in that port for towage April 1, 1871, (p. 25, marg. page 66,) 47 days before the petition was filed. Indeed, there is no evidence

that the Edith was absent from her home port at the expiration of the six months, and it is fair to infer (what, in truth, is the fact) that she was, before the filing of the libel for towage, attached by the Sheriff, under the State law, and discharged by giving the bond mentioned in the New-York statute. (P. 2, marg. page 4.) The Sheriff could not have attached her while in the Marshal's custody. Nor could the Marshal have seized her while in custody of the Sheriff.

But it is unnecessary to resort to inference. The burden of bringing the case within the exception of the statute is upon the petitioners; and this they have failed to do.

Sedgwick on Stat. Construction, 50.

Second.

For another reason, no valid lien upon the ship Edith or her proceeds existed in favor of the petitioners when the petition was filed. The lien given by the statute of New-York had been discharged by giving the bond mentioned in the 12th section of that act. That section expressly provides, (4 *Edmonds' Stat.* 656:) "Upon such bond being executed and delivered to such attaching creditor or his attorney," * * * * "no further proceedings against the said vessel, so seized, shall be had under the provisions of this title, founded upon any demand, secured by such bond."

But it is said, that the portions of the statute giving the remedy to enforce the lien are void. Conceding this, for the sake of the present argument, how does it follow that the lien continues, in spite of this express enactment?

The State, upon the argument of the appellant, had power to create a lien. If so, it could annex any conditions to the continuance of the lien. The lienor was not bound to take proceedings under the State statute. Having chosen to do so, and obtained a bond thereby, his lien, under the statute, is at an end. In section 15, the giving of the bond is spoken of as the discharge of the vessel.

Even if all the provisions of the statute, as to enforcing the lien, are void, yet the Court will look into

them, for the purpose of ascertaining the meaning and purpose of the valid section.

Bank of Savings *vs.* The Collector, 3 *Wall.* 495.
Van Kleek *vs.* Dutch Church, 20 *Wend.* 457, 471.
Van Nostrand *vs.* Moore, 52 *N. Y.* 12.

One main object of the statute was to make a lien of very short duration. The debt ceases to be a lien at the end of six months from the time the debt is contracted, unless the vessel is absent from port, and in that case, it continues for only ten days after her return. In all cases where she leaves the port, it ceases, unless a specification is filed within twelve days after her departure. (Section 2.) The action on the bond must be brought within three months after its delivery. (Section 12.) The lien was terminated by giving the bond, with sureties, quite irrespective of the question as to the validity of the bond.

Third.

The whole statute upon which the appellants rely is unconstitutional so far as it relates to maritime contracts. This was so held in the Josephine, 39 *New-York*, 19. It has been contended that the decision as to the validity of the lien was not necessary to the decision of that case. The precise point in controversy came up in Brookman *vs.* Hamill, 43 *N. Y. Rep.* 554; Poole *vs.* Kermit, 59 *N. Y. Rep.* 554; aff'g 5 *Jones & Spencer*, 114, and was decided adversely to the appellants. Those were actions on a bond given to discharge an attachment under the State law. The law provides, § 13: "If in any action brought upon such bond it be found that any sum be due the plaintiff, which was a subsisting lien upon such ship or vessel at the time of exhibiting the same, as herein provided, judgment shall be rendered that the plaintiff recover the same," &c.

The question before the Court in these cases was, therefore, whether a valid lien was given by the act in question. The Court of Appeals held it was not. The New-York cases, already referred to, were cited with approval in Edwards *vs.* Elliott, 21 *Wallace*, 532, 557. The whole of the statute is so inseparably blended that it must stand or fall together.

In Campau *vs.* Detroit, 14 *Mich.* 276, 285, Cooley, J., says: "We know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder, when all parts relate to the same subject matter, and provide the necessary steps to be taken in perfecting a single proceeding." To the same effect are

Lathrop *vs.* Mills, 19 *Calif.* 513.
Warren *vs.* The Mayor, 2 *Gray*, 85.
State *vs.* Comms. Perry Co., 5 *Ohio State Rep.* (*N. S.*) 497.
Oatman *vs.* Bond, 15 *Wisc.* 20.

This view is confirmed by the title of the act, which is, "An act to provide for the collection of demands against ships and vessels." At the time the statute was passed, there was no rule of court or practice under which a lien created by the State law could be enforced in Admiralty. The appellants concede that the remedy which the State law undertook to give was beyond the power of the State. On this position, there is a right given by statute without any remedy whatever. The intention to create such an anomalous condition of things cannot be imputed to the Legislature, contradicting as it does the title of the act. From the nature of the lien, it is only a right to arrest the vessel, and if there is no right to arrest her, there can be no lien.

The Globe, 2 *Blatchf. C. C.* 427.
People *vs.* The Mayor's Court, 1 *Wend.* 39.

By section 19 of the statute, the liens are to be paid "in the order of the delivery of the respective warrants to the Sheriff"—not in the order in which the debts were contracted or the specifications filed.

Fourth.

Even if a valid lien was given by the State statute, it could not be enforced in Admiralty against the ship at the time this petition was filed, nor at the time of the decree of the District Court, which was Jan. 12, 1872. (P. 7, marg. p. 13.) The rule of the Supreme Court giving process *in rem* in such cases was adopted May 6, 1872. (13 *Wallace*, XIV.) The

proceeds of the ship stand in place of the ship, and if there was no remedy in Admiralty against the ship, there can be none against her proceeds.

The Neptune, 3 *Knapp P. C. Ca.* 94.
The New Eagle, 2 *W. Rob.* 441.
The Velocity, 3 *Law Rep. N. S.* 61.
The Monte Allegre, 9 *Wheat.* 616, 648.
Buxton *vs.* Snee, 1 *Ves. Sen.* 154.
Gardner *vs.* N. J., *Pet. Adm.* 223.

It was argued in the Court below, that there might be a remedy against the proceeds, though there was none against the ship. But how can the conversion of a vessel into money enlarge the rights of some creditors and diminish those of others?

Fifth.

Irrespective of a valid statute giving a lien, there is no lien in Admiralty for repairs done to a vessel in her home port. The contract is a maritime contract, and can be enforced by a libel *in personam*, but there is no lien except by force of a positive statute.

The Lottawanna, 21 *Wallace*, 558.
3 *Kent Comm.* 169.
The General Smith, 4 *Wheaton*, 438.
The St. Jago de Cuba, 9 *Wheat.* 409.

Sixth.

If there is no lien, the petitioners have no equity equal to that of Daniel Tyler, who holds a mortgage upon the vessel. Nor can they claim any portion of the proceeds as against the assignee in bankruptcy of Charles Carow, who made the contract for the repairs. The assignee represents all the creditors, and in the absence of a specific lien, is entitled to the proceeds of the ship.

Bankrupt Act, § 14.
U. S. Rev. Stat. §§ 5044, 5046, 5052.

It cannot be denied that at one time it was the practice in the English Admiralty, and in some of the District Courts in this country, to decree payment of

bills for supplies furnished in the home port out of the proceeds of a vessel. But this was done only as between the owner and the material man, and was an expeditious way of enabling the latter to get his money without a formal libel *in personam*. The relief referred to was never granted as against the holder of a specific lien on the vessel. (See cases cited under Fourth Point.)

To have granted it in this case would have been to give Bucknam & Co. an unlawful preference.

Seventh.

Even if the arguments of the appellants were well founded, the decree should be affirmed, for a reason stated on the hearing in the District Court, but not considered there, so far as these appellants are concerned, because the decision actually given made this unnecessary.

On the appellants' theory, they have a lien on the whole ship. Tyler's mortgage was a lien on three-quarters only. On familiar principles of equity, the appellants should be paid out of the one-quarter on which Tyler has no lien, rather than out of the three-quarters upon which he has a lien.

1 *Story Eq.* § 633.
Wiggin *vs.* Dorr, 3 *Sumner*, 410, 414.
Cheesebrough *vs.* Millard, 1 *Johns. Ch.* 409.
The Trident, 1 *W. Rob.* 29, 35.

Eighth.

The decree appealed from should be affirmed, with costs.

EVERETT P. WHEELER,
Advocate for Appellee.